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No. 02-1734

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IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION,

Appellant,

—v.—

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT ACLU

Joel M. Gora
Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7926

Mark J. Lopez
(Counsel of Record)
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
125 Broad Street
New York, New York 10004
(212) 549-2608

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REPLY BRIEF OF APPELLANT ACLU

I. The Right of Organizations Like the ACLU to Engage in Public Debate on Critical Issues of the Day Through Any Medium the Organization Deems Appropriate, Including Broadcast Ads, Lies at the Core of Constitutionally Protected Speech, as this Court Recognized in *Buckley v. Valeo*, 424 U.S. 1 (1976).

The government's and the intervenors' conception of the First Amendment is stunningly at odds with this Court's First Amendment and campaign finance jurisprudence. Speech that refers to or discusses the qualifications of candidates lies at the core – not the fringes – of the First Amendment's protection. In a participatory democracy, where an informed electorate is essential, any restrictions on speech that interfere with the ability to praise, criticize or debate the qualifications of candidates, or discuss the issues that they campaign on, necessarily reduces the candidates' accountability by shielding them from scrutiny. Title II's restrictions take on greater significance when the candidate is already a public official and the effect of the restriction is to stifle criticism of government itself. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Moreover, by targeting radio and television ads, the statute perversely bans the most effective form of speech by suppressing information that is intended to reach the largest audience. Far from advancing the interests asserted by the government in this case, Title II disserves the goal of an informed electorate and thereby undermines the democratic process.

The defending parties' startling response to this charge is that the problem of corruption justifies a ban on criticizing government or discussing the qualifications of candidates. This far-reaching argument is foreclosed by

Buckley v. Valeo, 424 U.S. 1 (1976). This Court's opinion in *Buckley* repeatedly stressed that campaign finance laws must be narrowly tailored to avoid "unnecessary abridgement of [First Amendment] freedoms." *Id.* at 64. Both the government and the intervenors critically misperceive the substantial reach of Title II and its impact on heretofore constitutionally protected speech. One aspect of *Buckley* is particularly critical here. *Buckley* held that the government's regulation of expenditures must be limited to "communications that in express terms advocate the election or defeat of a clearly identified candidate,..." *Id.* at 45. This "express advocacy" doctrine, which *Buckley* adopted to " distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons...." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986), has played a critical role for almost three decades in protecting issue-oriented speech by providing a bright line between permissible and impermissible government regulation. The ban on electioneering communications unapologetically targets issue advocacy and brushes aside the bright line distinction between words of express advocacy and all other speech that merely refers to a candidate. In an ill-conceived effort to avoid the vagueness problems present in *Buckley,* the defendants have targeted the very speech that the Court sought to protect in *Buckley* when it drew a distinction between contributions which could be limited, and expenditures which could not.

Nevertheless, the defendants maintain that the principles established in *Buckley* have been overtaken by time and experience and that the empirical judgment the Court made in that decision about the inherent worth of issue advocacy speech should be jettisoned. That judgment, however, is linked inextricably to broader and enduring First Amendment principles that were well established long before *Buckley,* and which have been reaffirmed by the Court many times since. Neither the government nor the intervenors

make any attempt to grapple with those overriding First Amendment principles, and instead defend Title II as if the Court's campaign finance jurisprudence was developed completely untethered from those principles. This short-sighted approach represents an unalloyed assault on traditional First Amendment analysis and on *Buckley* itself. The *Buckley* decision has served as a bulwark against laws that masquerade as campaign finance reform, but which stifle criticism and debate over the qualifications of candidates and elected officials. The careful balance made in *Buckley* between fully protected candidate-referred speech and more specific exhortations to vote serves the important First Amendment interests that animate a free society and a participatory democracy.

A. *Buckley* and the First Amendment Tradition

Buckley's central holding is that any regulation of non-candidate expenditures must stop short of stifling dissent or debate on public issues or criticism of our elected officials. That holding is firmly rooted in traditional and enduring First Amendment principles that reflect "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open..." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). These principles and our unflagging commitment to debate on public issues are strained to the limit by the government's defense of Title II. The very notion that advocacy groups like the ACLU can be prohibited from using the broadcast medium to question the policy positions of our elected officials during an election season is completely foreign to the First Amendment.

"Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940). It is for

this reason that debate on matters of public concern, lies at the very heart of the First Amendment. *Connick v. Meyers*, 461 U.S. 138, 145 (1983). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* At 145 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). The debate on matters of public concern can fulfill its purpose in a democratic society only if it is free and unrestrained. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times v. Sullivan*, 376 U.S. at 269.

By stark contrast, Congress has sought to moderate the debate over public issues and the qualification of candidates by adoption of the broadcast ban on terms that prohibit non-profit corporations – including thousands of traditional non-partisan issue advocacy organizations like the ACLU, Sierra Club, NOW, AARP, and the NRA -- from directly participating in that debate through the broadcast media. Laws that prohibit all corporations from engaging in otherwise constitutionally protected speech, for no other reason than that they hold corporate charters, threaten the ability of organizations like the ACLU and its members to participate fully in the important national debates of our time.[1]

The speech of the ACLU and other issue advocacy organizations on pending legislative matters and on the

[1] No less so does the defendants' response to this objection that the ACLU and other advocacy groups remain free to participate in the debate if they agree to be regulated as if they were political committees. The ACLU has resisted attempts to classify it as a political committee for reasons that have been affirmed by the Court in *Buckley*. See *American Civil Liberties Union v. Jennings*, 366 F. Supp 1041 (D.D.C. 1973)(three judge court) *vacated as moot sub nom. Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975). The organization cannot be required to forego its independence from FECA in order to participate in the debate over the direction of this country. *See Infra*, Point II. B.

positions of candidates is part of a nationwide debate in which the listener is being asked to make an important choice about the government's policies, and to think more broadly about the role and responsibilities of our elected officials. The timeliness and significance of that discussion is clear. *See Thornhill*, 310 U.S. at 102-03. It is equally clear, however, that there is sharp disagreement over how those choices should be resolved. The ACLU's right to participate in this debate is qualitatively different than the interests Congress sought to address by adoption of Title II. The BCRA calls speech of this nature "electioneering communications" if they are made within the applicable blackout periods. The government's suggested labels, however, cannot control this Court's First Amendment analysis. *See New York Times Co. v. Sullivan*, 376 U.S. at 269; *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 627-28 (1996)(Kennedy, J., concurring in part, dissenting in part).

In a participatory democracy, the First Amendment does not allow the government to substitute its judgment for the people's in evaluating conflicting arguments on matters of public concern by suppressing the flow of information essential to informed decision making. *First National Bank v. Bellotti*, 435 U.S. 765, 777 (1978). It is "'[t]he very purpose of the First Amendment....to foreclose public authority from assuming a guardianship of the public mind...'" *Riley v. National Federation of the Blind*, 487 U.S. 781, 791 (1988) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945)(Jackson, J. concurring)).

B. Elections and the First Amendment Tradition

Congress is not free to interfere with the debate over the conduct of our elected officials on the grounds that the ACLU's statements "refer" to a candidate or because they may be perceived as "supporting" or "opposing" a candidate. This is particularly true, where as here, Congress has acted to

hobble an entire class of speakers in the debate based on their organizational form. As stated in *Bellotti* "the inherent worth of speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." 435 U.S. at 777. Congress' paternalistic instincts in this case about the worth and influence of speech communicated by corporate speakers, especially non-profit corporations, are simply misplaced. *Id.* at 785-86. So too are its efforts to moderate the debate by controlling the timing of it, *see Mills v. Alabama*, 384 U.S. 214 (1966), and by closing off the medium likely to reach the widest audience. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 481 (1974)(consolidation of the newspaper industry does not justify Florida's Right of Reply statute under the First Amendment).

Under the defendants' formulation of the First Amendment interests at stake in this case, the very same speech that is entitled to full constitutional protection outside the blackout period preceding an election, is entitled to no protection if uttered during the blackout period. This notion sets the First Amendment on its head. There is a direct and inherent correlation between the substance and vigor of political debate and the conduct of elections. Both the government and the intervenors gloss over the importance of this correlation and the consequences for our democratic traditions. As recognized in *Buckley*, "[d]iscussion of public issues and debate on qualification of candidates are integral to the operation of the system of government established by our Constitution...,"424 U.S. 14-15. Moreover, "[n]ot only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." 424 U.S. at 42. Thus, the electoral context of the debate provides *less* – not more -- justification for imposing restrictions on speech. What the defendants describe as narrow tailoring, in fact cuts a wide

swath in the First Amendment by directly targeting the content, timing, and mode of expression that is most closely linked to our democratic processes. Far from being narrowly tailored, the broadcast ban strikes a profound blow to the political discourse so essential to informed decision-making and government accountability.

The sweepingly broad primary definition contained in the statute unavoidably captures speech that has no electioneering purpose or message whatsoever, but instead is based solely on the proximity of the speech to a pending election. As Judge Leon's opinion correctly observed, this type of arbitrary line drawing cannot justify treating otherwise constitutionally protected speech as an electioneering communication and bringing it within FECA's coverage. The backup definition's attempt to link the communication to an electioneering purpose is no less flawed and, indeed, does more harm to First Amendment interests because the blackout period is much longer than the 30/60 rule applicable to the primary definition. The backup definition both as written and as construed by the lower court, is a return to the vague and imprecise efforts of the past to regulate speech critical or supportive of public officials under the pretense of regulating campaign finances.[2]

Finally, it is no response to argue, as both the government and the intervenors do, that the electioneering communications provision falls short of a total ban on speech and thus, presumably, should be judged more sympathetically under the First Amendment. That claim is misguided for three fundamental reasons. First, Title II effectively functions as a total ban on electioneering

[2] Neither the government nor the intervenors make any effort to defend the truncated, fallback definition of "electioneering communications" that the district court adopted. And, neither the government nor the intervenors make much of an effort to defend the fallback definition that Congress adopted and that the district court found unconstitutionally vague. That strategic judgment is well-warranted.

communications by nonprofit advocacy groups like the NRA and the ACLU given the strict reading of *MCFL* adopted by the FEC and endorsed by the government and the intervenors in this case.[3] Second, this Court has recently rejected the notion that content-based regulations on speech are entitled to greater judicial deference than content-based prohibitions. "When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *United States v. Playboy Entertainment Group,* 529 U.S. 803, 826 (2000). Finally, the "alternative" of speaking through a PAC poses severe First Amendment problems as well. *See Infra*, Point II. B.

II. Title II's Regulation of Non-Candidate Expenditures is Foreclosed by *Buckley* and Its Progeny, and Cannot be Conditioned on the Establishment of a Segregated Fund or PAC.

A. *Buckley* and Its Progeny

Even if the broadcast ban is analyzed on the government's own terms as involving campaign activity and nothing more, Title II cannot be reconciled with *Buckley* and would upset the balance made in that case between expenditures that are entitled to full constitutional protection and other campaign activity. The regulation of expenditures for political speech runs head long into numerous decisions of this Court holding that the First Amendment forbids the imposition of expenditure limits on candidates, individuals, and groups – including political parties, political committees, and issue advocacy organizations. The only departure from this steadfast rule is the prohibition against expenditures that exhort the listener to vote for or against a candidate when

[3] *See MCFL* discussion *Infra,* Point II. A. and n. 7.

paid for from corporate treasury funds in the narrow circumstances present in *Austin v. Michigan Chamber of Commerce* 494 U.S. 652 (1990). That case provides no support for expanding FECA's coverage to the immensely broader goal of prohibiting all broadcast communications that simply "refer[] to" a clearly identified candidate if paid for from corporate treasury funds. *Austin,* with its concern over aggregate corporate wealth, provides even less support for regulating the speech of membership organizations, comprised of individuals, like the ACLU, during the 60 days prior to a general election or 30 days before a primary. To argue that *Austin* provides the very source of the power to regulate the ACLU's activities, distorts the holding in *Austin* and ignores the fundamental interest at stake in this Court's cases striking down expenditure limits as a violation of the First Amendment.

In crafting the argument that Congress may legitimately place temporal limits on the ACLU's broadcast communications during the period before federal elections, the defending parties cast aside the clear import of this Court's numerous decisions involving expenditure limits imposed on candidates and non-candidates alike. We know from *Buckley* that expenditure limits of any kind may not be imposed on individuals, groups, or candidates. *FEC v. National Conservative PAC*, 470 U.S. 480 (1985) teaches that they may not be imposed on political committees (in that case one which was a non-membership, nonprofit corporation), and *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986) instructs that they may not be imposed on traditional issue advocacy groups that are not linked with for-profit corporate interests. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (*Colorado I*), the Court reaffirmed that expenditure limits operate as direct restraints on speech and that they may not be imposed on political parties. *See also Bellotti*, which protects a corporation's right to engage in

issue advocacy. Indeed, direct or temporal limits have never been upheld by this Court, except in the narrow circumstances presented in *Austin*.

As these cases make clear, under no conception of the First Amendment is it permissible to stifle dissent or debate on public issues or criticism of our elected officials simply because the debate occurs in the context of elections or based on the identity of the speaker. Nothing in *Austin* or in the Court's broader First Amendment jurisprudence remotely supports such a far-reaching conclusion. The defendants have lost sight of the First Amendment principles at work in this Court's political expenditure cases and which fully protect political advocacy by organizations constituted for that purpose. If anything, groups like the ACLU, whose commentary on public issues is divorced from any partisan purpose, merit greater – not lesser – protection than individuals and organizations seeking to influence electoral outcomes. For this reason, neither Title II's ban on electioneering communications nor its disclosure requirements can be constitutionally applied to the ACLU and organizations like it.

To be sure, this Court twice has been called upon to define the permissible reach of expenditure limits as they affect issue advocacy groups not organized as political committees. *See FEC v. Massachusetts Citizens For Life, Inc., supra; Austin v. Michigan Chamber of Commerce, supra*. Two limiting principles emerge from those cases.

First, when the Court reaffirmed the express advocacy rule in *MCFL,* limiting the reach of FECA, it specifically noted that the rule had been crafted "in order to avoid problems of overbreadth". *Id.* at 248. [4] The BCRA

[4] Contrary to the defendants' view, the express advocacy doctrine reflects more than a concern about vagueness. It embodies a substantive and fundamental principle of First Amendment law. If any mention of a candidate in the context of a discussion about issues subjected the speaker to campaign finance controls, the consequences for "free discussion" would be intolerable and speakers would be compelled to "hedge and trim." *Buckley*, 424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945). Accordingly, all speech that does not "in express terms advocate the election or defeat of a clearly identified candidate" is outside the scope of permissible regulation. *Id.* at 44.

does not avoid problems of overbreadth, it embraces them as supposedly essential to addressing the proliferation of so-called "sham" issues ads. The primary definition of "electioneering communications" may be more specific than the expenditure provisions struck down in *Buckley*, but specificity alone does not resolve the overbreadth problem. *Board of Airport Commissioners v. Jews for Jesus, Inc.,,* 482 U.S. 569 (1987)(striking down policy that barred all "First Amendment activities" at Los Angeles International Airport). Furthermore, unlike the statute involved in last Term's decision in *Virginia v. Hicks,* ___ U.S. ___ (2003), Title II is targeted at expressive activity and has been challenged by groups, including the ACLU, that seek to engage in core political speech.[5]

[5] The overbreadth of the primary definition is amply demonstrated in Judge Leon's opinion. It is also demonstrated by its impact on the ACLU itself. The government and the intervenors attempt to dismiss the significance of the ACLU's experience by claiming that we have pointed to only a single radio ad that would be prohibited under Title II. However, two separate declarations submitted in this case by Anthony Romero, the ACLU's Executive Director, make clear that the ACLU has recently raised new funds that it plans to use, in part, for broadcast ads designed to promote the organization's legislative agenda. J.A. 721-722; J.A. 1817. In fact, the ACLU has just purchased five radio spots that are scheduled to run over the Labor Day Weekend. These spots highlight a recent House vote repealing the "sneak and peek" provisions of the USA PATRIOT Act, and urge critical Senators to take a similar position when they return from the August recess. Under the BCRA, these ads would be illegal if the legislative calendar had been different and this vote had occurred within the 30/60 day period set forth in Title II. Nor is that possibility speculative or unlikely. As pointed out in an exhibit attached to the declaration of Laura Murphy, Director of the ACLU's Washington Office, many important civil liberties issues are debated and voted upon

Second, in both cases the Court drew the critical distinction between the permissible regulation of certain types of nonprofit groups linked to traditional business corporations and other nonprofit groups that are more like political advocacy organizations and that do not function as a conduit for the types of business corporations subject to FECA regulation under 2 U.S.C. § 441. The distinction is justified by, among other things, the absence of plausible concerns over concentrated corporate wealth, and the fact that membership in the organization is both voluntary and based on ideological agreement with the organization's views and activities. *MCFL,* 479 U.S. at 257-58. This of course perfectly describes the ACLU. Indeed, people join the ACLU and contribute their membership dues precisely because they want the organization to use those funds to advocate on their behalf and to praise or criticize public officials for their positions on important civil liberties issues.[6] The fact that the ACLU receives a *de minimis* amount of corporate or union support does not change the fundamental character of the organization or justify treating it as the type of organization under consideration in *Austin*. Contrary to the position advanced by both the government and the intervenors in this case, the factors identified by the Court in *MCFL* are not rigid criteria defining the outer limits of permissible regulation of issue advocacy groups, but

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in the period immediately preceding congressional elections. J.A. 613, 622 - 626. It is fanciful to suggest that such advertisements by the ACLU and other similar groups implicate the concerns with corporate corruption of the political system in any real or substantial way or that if they were run in September 2004, rather than September 2003, they would warrant prohibition.

[6] Following the September 11, 2001 terrorist attacks, there was a significant increase in the ACLU's membership that reflected concern with the subsequent attack on civil liberties. *See* Declaration of Anthony Romero J.A. 1817.

general guideposts for insuring that true issue advocacy groups remain free to express their views.

It is true that the Court has expressed concern that certain politically powerful and influential advocacy groups could act as a conduit for large corporate contributions. *FEC v. Beaumont*, __ U.S. ___ (2003). But such groups are hardly representative of the ACLU or thousands of nonprofit issue advocacy groups which do not seek in any way to influence elections. Moreover, the Court's concern in *Beaumont* came in the context of the FECA's longstanding prohibition against corporate *contributions*. Accordingly the perceived danger of corporate contributions to the political process was sufficient to justify the statutes prophylactic approach under the lesser standard of First Amendment scrutiny that this Court applies in cases upholding limits on contributions. Under the heightened scrutiny applicable to independent expenditures, however, Congress is not free to regulate so broadly. *See MCFL*, 479 U.S. at 260. *Beaumont* reaffirmed this Court's holding in *MCFL* by hewing to the constitutional distinction between permissible regulation of contributions and impermissible regulation of expenditures by non-profit corporations. The concerns that animate the Court's decision in *Beaumont* are largely absent in the case of expenditures because those expenditures – unlike contributions to candidates -- are independent and in many cases totally unrelated to any electioneering purpose or motive. While some non-profit advocacy groups may engage in more focused candidate or campaign related expenditures, that cannot provide the justification for broadly regulating the speech of the ACLU and other advocacy organizations that receive a modest amount of corporate money or have not adopted a formal policy of returning all corporate contributions – regardless of the size or identity of the corporate contributor.

The District Court was obviously constrained by *MCFL* and construed Title II to exclude qualified *MCFL*

corporations. At the very least, this Court should affirm that holding. But the real danger that inheres in the lower court's analysis is that it contemplates that pure issue advocacy organizations like the ACLU may not qualify for an *MCFL* exemption. In fact, under recently promulgated FEC regulations, the ACLU presumably does not qualify for exemption because it has not returned the exceedingly modest amount of money that has been contributed to the organization in recent years from sources other than individuals. *See* Brief of Appellant ACLU, p. 9, n.8.; 11 C.F.R. § 114.10. *See also, FEC v. National Rifle Association,* 254 F.3d. 173 (D.C. Circuit 2001). The possibility that the ACLU might not qualify for an *MCFL* exception cannot provide the justification for treating the organization as if it were General Motors or Microsoft. Rather it highlights the extraordinary breadth of the statute.[7]

[7] We agree that this case is not the proper vehicle to determine whether the ACLU qualifies for an *MCFL* exception, or whether the nature of the organization and the controversial positions it takes entitles it to an exemption from any obligation to disclose its members and contributors. However, if *only MCFL* corporations will be allowed to engage in "electioneering communications," we do think it is appropriate for this Court to clarify the scope of the *MCFL* rule. Specifically, we urge this Court to hold that nonprofit advocacy groups, like the ACLU, are entitled to be treated as *MCFL* corporations, even if they receive *de minimis* corporate or union contributions. In particular, it is clear from *Austin* that the ban on corporate express advocacy has been justified by two related concerns: the fact that corporations can amass significant fortunes as a result of the unique legal benefits conferred upon them, and the fact that the resources of a business corporation do not measure the extent of its ideological support. Neither of those concerns applies to the ACLU, which received less than 1% of its budget from non-individual sources and whose membership directly reflects the level of support for its ideological positions. Requiring the ACLU to forgo the modest amount of support it receives from non-individual sources, amounting to $85,000 in 2001 (although none of those contributions exceeded $500), is tantamount to exacting an excessive fee as a condition of exercising First Amendment rights. *See Forsyth County v. National Movement,* 505 U.S. 123 (1992). *See Appellant ACLU's Brief,* pg. 29, n. 15.

B. The PAC "Alternative"

The defendants' answer to the First Amendment objections raised in this case is that the ACLU can reconstitute as a PAC if it wants to speak. But, Congress cannot circumvent *Buckley* by requiring the ACLU to finance constitutionally protected speech through a segregated fund or PAC. While this requirement may be understandable in the context of contributions made by non-profit corporations to candidates, *see Beaumont,* it cannot be justified in the context of independent expenditures, *see MCFL* – much less those expenditures that do not purport to seek to influence elections. Political committees are regulated as such because their primary purpose is to influence federal elections. The ACLU and thousands of other organizations like it are not created for this purpose and therefore should not be required to operate as if they were. If at some time it is determined that the ACLU has crossed the line and become an organization whose primary purpose is to influence federal elections, it would then become subject to the obligations and restrictions applicable to political committees. See *MCFL,* 479 U.S. at 262. That time has not come and there is no justification for advancing FECA's coverage to the organization's speech.

The consequences are not insignificant. Creating a PAC would compel the ACLU to adopt a partisan form in order to speak, which is prohibited by our corporate charter, is at fundamental odds with our 82-year tradition of non-partisan advocacy of civil liberties and casts us in a false light of partisanship. Thus, for the ACLU and other organizations like it, the mandatory creation of a PAC is a form of compelled speech that cannot be the price of exercising our rights under the First Amendment. *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943). Similarly, the new "electioneering communication" regulations would require us to file a statement disclosing, inter alia, "all clearly identified candidates referred to in the

electioneering communication and the elections in which they are candidates." 11 CFR ¶ 104.20 (c) (1). Being thereby forced to characterize our criticism of government officials as election-related is an athema to the non-partisan stance that is at the core of our organizational identity. *See Wooley v. Maynard*, 430 U.S. 705 (1977). It is particularly offensive to First Amendment principles for the government to dictate the format of speech that tends to be critical of the government itself. The intervenors' suggestion that we can avoid any misimpression of partisanship by labeling our PAC the "ACLU Election-Period Non-Partisan Legislative Advocacy Fund," Intervenors' Brief at 73, borders on the frivolous. It also ignores the administrative burdens associated with establishing and maintaining a PAC that this Court found significant in *MCFL*. The basic compliance regulations governing political committees are incredibly detailed and span over fifty densely-packed pages in the Code of Federal Regulations. *See* 11 CFR, Parts 102-105, 109. They would also subject the organization to impermissible disclosure requests. *See FEC v. MCFL*; *supra; ACLU v. Jennings, supra.* Finally, political committees are subject to FECA restrictions limiting the amount of money that can be contributed to the organization from any single source – even though the ACLU has no political purpose.

As we have emphasized throughout, the ACLU has consistently resisted the persistent attempts to use the FECA to regulate and restrain issue advocacy in a manner violating time-honored First Amendment principles. The New York Civil Liberties Union was a party in *Buckley* itself challenging the FECA's expenditure limitations and disclosure provisions. *See also, United States v. National Committee for Impeachment*, 462 F. 2d 1135 (2d Cir. 1972); *American Civil Liberties Union v. Jennings*, *supra*. Those cases helped fashion the critical principles designed to limit the impermissible reaches of the FECA and to establish

without doubt that non-partisan, issue-oriented organizations cannot be subject to campaign finance controls. Building on those principles, this Court has repeatedly reaffirmed, in *Buckley* and elsewhere, not only the bright line distinction between issue advocacy and more focused campaign activity that the BCRA now seeks to obliterate, but also the impermissible reach of campaign finance regulation to organizations like the ACLU which are non-partisan and do not seek to influence elections.

In those early ACLU cases, Congress attempted to control and limit even newspaper ads that mentioned and criticized federal candidates. Now, Congress seeks to control and limit broadcast ads that mention and criticize federal candidates. If this Court interprets the First Amendment to uphold the latter, can efforts to reassert control over the former be far behind?

CONCLUSION

For the reasons stated above, the challenged provisions of Title II of the BCRA should be declared unconstitutional.

Joel M. Gora
Brooklyn Law School
250 Joralemon Street
Brooklyn, NY 11201

Mark J. Lopez
Counsel of Record
Steven R. Shapiro
American Civil
Liberties Union
Foundation, Inc.
125 Broad Street
New York, NY 10004
(212) 549- 2608

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